

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Continue)	Rulemaking 08-08-009
Implementation and Administration of California)	(Filed August 21, 2008)
Renewables Portfolio Standard Program.)	

**SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E)
OPENING BRIEF REGARDING JURISDICTION
OVER FEED-IN TARIFF PRICING**

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program.))))) Rulemaking 08-08-009) (Filed August 21, 2008)
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**I.
INTRODUCTION AND SUMMARY**

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission (the “Commission”) and the *Administrative Law Judge’s Ruling Regarding Briefs on Jurisdiction in the Setting of Prices for a Feed-In Tariff*, dated May 28, 2009 (“ALJ Ruling”), San Diego Gas & Electric Company (“SDG&E”) addresses below the issue of Commission authority to establish wholesale pricing terms in the feed-in tariffs (“FiTs”) offered by the investor-owned utilities (“IOUs”).

The ALJ Ruling sets forth four questions to be addressed in briefs: (i) what is the scope of the Commission’s authority to establish the price level in an expanded FiT?; (ii) do you agree or disagree with the arguments of Southern California Edison (“SCE”) regarding the scope of the Commission’s price setting authority in an expanded FiT program?; (iii) if the Commission expands the FiT program, on what basis should the Commission set the purchase price for the electricity (*e.g.* buyer’s avoided cost, seller’s cost of service, market price, market price referent, other)?; and (iv) may the Commission

require an RPS-eligible generator, in order to be eligible for the expanded FiT program, to be an exempt wholesale generator or to meet other specific conditions?^{1/}

As SDG&E explains below, under the framework established by federal law, the Commission's authority to establish the price level in an expanded FiT depends upon the characteristics of the sellers participating in the FiT program. Where FiT program participants have Qualifying Facility ("QF") status under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"), the Commission's authority to set rates is limited to ensuring that such rates are set at or below avoided cost. Where program participants are non-QF "public utilities" under the broad definition included in the Federal Power Act ("FPA"), exclusive authority to set the rates rests with the Federal Energy Regulatory Commission ("FERC"). The Commission must avoid adopting FiT pricing provisions that exceed its jurisdiction and therefore must determine the likely participants in the FiT program before attempting to establish pricing.

II. DISCUSSION

Section 201(b)(1) the FPA establishes FERC's exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce."^{2/} The FPA governs wholesale sales by public utilities^{3/} and defines wholesale sales as a "sale of electric energy to any person for resale."^{4/} Where the wholesale sale involves generation that

^{1/} ALJ Ruling, p. 3.

^{2/} 16 U.S.C. § 824(b)(1).

^{3/} "Public utilities" is defined broadly to include sellers of electricity other than governmental entities, as defined in § 824(f). See 16 U.S.C. § 824(b)(1); *Connecticut Light & Power Company*, 70 FERC ¶ 61,012.

^{4/} *Id.* at § 824(d).

flows on a multi-state interconnected grid, it is deemed to be a “sale in interstate commerce.”^{5/}

The U.S. Supreme Court has made clear that FERC’s authority over wholesale sales of electricity is plenary, noting that States are obligated to “give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.”^{6/} It has observed that “Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction . . .,” and that FERC jurisdiction extends to “all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”^{7/} As this statement acknowledges, Congress has in some instances acted to carve out specific wholesale transactions from the plenary authority exercised by FERC over wholesale sales by public utilities in interstate commerce. Most notably, PURPA establishes a separate jurisdictional framework applicable to certain qualifying facilities (“QFs”), including cogeneration and small power production facilities, and provides a role for the States in implementing the statute.

Under PURPA, IOUs must purchase electric generation from QFs at rates that are (i) just and reasonable; (ii) in the public interest; (iii) non-discriminatory; and (iv) not in excess of the incremental cost of alternative electric energy, or “avoided cost.”^{8/} Section 210(f) of PURPA directs FERC to develop rules applicable to QF transactions and delegates to the States the authority to implement such rules. Thus, while state regulatory

^{5/} See *Federal Power Commission v. Florida Power & Light*, 404 U.S. 453 (1972); 16 U.S.C. § 824(c).

^{6/} *Nantahala Power & Light Co. et al. v. Thornburg, Attorney General of North Carolina, et al.*, 476 U.S. 953, 966 (1986).

^{7/} *Federal Power Commission v. Southern California Edison Co. et al.*, 376 U.S. 205, 215-216 (1964).

^{8/} 16 U.S.C. §§ 824a-3(b) and (d); 18 CFR 292.304.

commissions may exercise jurisdiction over QF rates, their authority is limited to ensuring that the rates charged by QFs do not exceed avoided cost.^{9/}

In *Connecticut Light & Power Company*, FERC clearly delineated the parameters of its jurisdiction over wholesale transaction. It divided wholesale sellers into three categories: (i) QFs; (ii) public utilities; and (iii) entities that are neither QFs nor public utilities (including states and their subdivisions, agencies, authorities, instrumentalities, etc.).^{10/} It declared:

In the case of QFs, [FERC] has authority under PURPA to regulate how rates for QF sales at wholesale will be determined. Although states may set the ultimate per unit (kW and/or kWh) charges for QF sales at wholesale, they may do so only in accordance with [FERC's] regulations. In the case of facilities that are not QFs, but where the energy is sold by public utilities at wholesale in interstate commerce, [FERC] has exclusive authority to set the rates.^{11/}

FERC concluded in *Connecticut* that to the extent the state regulation at issue set rates for sale by a QF in excess of avoided cost and established rates for non-QF public utilities for wholesale sales in interstate commerce, such state regulation tread impermissibly upon FERC's exclusive jurisdiction and was therefore preempted.^{12/}

FERC reached a similar conclusion in *Midwest Power Systems*, in which it considered an Iowa statute and implementing regulations that required electric utilities to enter into long-term contracts to purchase or wheel electricity from certain facilities at prices established by the Iowa Utilities Board. Applying an analysis identical to that set forth above, FERC concluded that “the orders of the Iowa Board are preempted to the

^{9/} See, e.g., *Connecticut Light & Power Company*, 70 FERC ¶ 61,012 (1995), 1995 FERC LEXIS 37, 20.

^{10/} *Id.* at p. 19. Because the FiT program is aimed at entities falling into the first two categories identified by FERC, SDG&E does not herein address jurisdictional issues related to entities falling into the third category identified by FERC.

^{11/} *Id.* at p. 2.

^{12/} *Id.* at pp. 27, 30.

extent they require rates to QFs in excess of the purchasing utilities' avoided cost, and to the extent they set rates for the wholesale sales of electric energy by public utilities.”^{13/}

Under the jurisdictional framework established by the FPA and PURPA, the Commission's authority to establish the price level in IOU FiTs depends upon the characteristics of the participating sellers. Sales under the FiT program would constitute sales for resale, and would therefore satisfy the “wholesale” sale requirement of FPA.^{14/} Similarly, since the California grid is part of the interconnected grid of the Western Electricity Coordinating Council (“WECC”), sales of generation pursuant to a FiT would be considered a sale in interstate commerce for purposes of the FPA.^{15/} Thus, where FiT sales constitute wholesale sales in interstate commerce, the limits of the Commission's authority will turn on whether FiT program participants are QFs or public utilities (under the FPA's broad definition). For program participants with QF status, the Commission's authority to set rates is limited to ensuring that rates are set at or below avoided cost; where program participants are non-QF public utilities under the FPA, exclusive authority to set the rates rests with FERC.^{16/}

In its previously-filed comments on the Commission's FiT program proposal, SCE noted that “only FERC may set rates for wholesale power sales by public utilities.”^{17/} It explained that:

[A] sale of renewable energy output by an electric generation facility to an electrical corporation such as SCE would be a sale for resale of electric energy at wholesale in interstate commerce. The existence of this wholesale sale raises the issue of whether the State, acting through

^{13/} *Midwest Power Systems*, 78 FERC ¶ 61,067 (1997), 1997 FERC LEXIS 123, 10.

^{14/} See 16 U.S.C. § 824(d).

^{15/} See *id.*, § 824(c).

^{16/} See *id.*

^{17/} *Southern California Edison's Response to ALJ's Ruling on Additional Commission Consideration of a Feed-In Tariff*, filed in R.08-08-009, dated April 10, 2009.

the Commission, has the authority to set wholesale prices for such transactions, absent the participants obtaining qualifying facility (“QF”) status and the Commission assuring that the rate it set was an avoided cost rate.^{18/}

Noting that “[t]he Commission may not adopt a rate that is different than what federal law allows,” SCE recommended that the Commission “examine its authority to set pricing for an expanded FiT program.”^{19/} SDG&E agrees that the Commission must observe the limitations upon its authority imposed under federal law and must avoid adopting FiT pricing provisions that exceed its jurisdiction.

With regard to the ALJ Ruling’s inquiry regarding the basis upon which the Commission should set the FiT purchase price, SDG&E submits that additional information is required and that proposals on that point would be premature at this time. It is not clear, for example, what percentage of likely FiT participants are QFs versus public utilities (as defined for purposes of the FPA). This determination has jurisdictional implications and will directly influence the approach to be taken by the Commission in setting rates for the FiT program. Moreover, a FiT program that included both types of sellers with different pricing structures for each would significantly complicate what is intended to be a simple mechanism and could unintentionally create perverse incentives. Thus, more information and further consideration is required before proposals regarding this issue may be developed.

In addition, further explanation is required concerning the Commission’s inquiry as to whether it should require an RPS-eligible generator to be an “exempt wholesale generator” in order to be eligible for the expanded FiT program. It is not immediately apparent what purpose would be served by such a requirement in the context of

^{18/} See *id.*, p. 2 (citations omitted).

^{19/} See *id.*

Commission pricing authority. Inasmuch as FERC exercises exclusive jurisdiction over pricing by exempt wholesale generators, it is not clear how requiring RPS-eligible generators to obtain exempt wholesale generator status would confer any greater level of pricing authority on the Commission or, indeed, if this outcome is what the Commission had in mind in making the proposal. Thus, additional information regarding the objectives underlying such a requirement would be helpful.

III. CONCLUSION

Under the framework established by the FPA and PURPA, the Commission's authority to establish FiT pricing depends primarily upon the characteristics of the sellers participating in the FiT program. The Commission must avoid adopting FiT pricing provisions that exceed its jurisdiction and therefore must determine the likely participants in the FiT program before attempting to establish pricing. The Commission should also provide clarification regarding its inquiry as to whether it should require an RPS-eligible generator to be an "exempt wholesale generator" in order to be eligible for the expanded FiT program.

Respectfully submitted this 18th day of June, 2009.

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